

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

RAYMOND D. YOWELL,

Plaintiff,

v.

ROBERT ABBEY et al.,

Defendants.

3:11-cv-518-RCJ-VPC

**ORDER**

Currently before the Court is the U.S. Court of Appeals for the Ninth Circuit's reversal and remand of this Court's prior decisions in this case.

**BACKGROUND**

On July 20, 2011, then *pro se* Plaintiff Raymond D. Yowell ("Plaintiff") filed a civil rights complaint pursuant to 42 U.S.C. § 1983, 25 U.S.C. § 478, and *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in this Court. (Compl. (#1) at 1). In the complaint, Plaintiff sued Robert Abbey<sup>1</sup>, Helen Hankins<sup>2</sup>, Department of the Treasury Financial Management Services ("Treasury-FMS")<sup>3</sup>, Allied Interstate Inc., Pioneer Credit Recovery, Inc., The CBE Group, Inc., Cook Utah of

<sup>1</sup> Abbey is currently the National Director of the Bureau of Land Management ("BLM"), but was the Nevada State Director of BLM in 2002. (Mot. to Dismiss (#4) at 3).

<sup>2</sup> Hankins is currently the Colorado State Director of BLM, but was the BLM Field Manager for the Elko Field Office in 2002. (Mot. to Dismiss (#4) at 3).

<sup>3</sup> Treasury-FMS is an institutional component of the Department of Treasury and manages the Treasury Offset Program which offsets federal payments to those persons and entities who are indebted to a federal agency. (Mot. to Dismiss (#4) at 3).

1 Duchesne, Jim Pitts<sup>4</sup>, Jim Connelley<sup>5</sup>, Dennis Journigan<sup>6</sup>, and Mark Torvinen (collectively  
2 “Defendants”). (*Id.* at 2-3, 6).

3 The complaint alleged the following. (*Id.* at 7). Plaintiff was a Shoshone Indian, ward  
4 of the United States, and a member of the Te-Moak Tribe of the Western Shoshone Indians  
5 of Nevada. (*Id.*). He was a cattle rancher. (*Id.*). Throughout his life, Plaintiff let his livestock  
6 graze on the “historic grazing lands associated with the South Fork Indian Reservation.” (*Id.*).  
7 During the 1980s, BLM attempted to get an Indian grazing association to sign a permit to  
8 graze livestock, but never approached Plaintiff directly. (*Id.*). Plaintiff never obtained a permit  
9 to graze his livestock because the proclamation that established the South Fork Indian  
10 Reservation, pursuant to the Indian Reorganization Act, stated that the reservation came  
11 “together with all range, and ranges, and range watering rights of every name, nature, kind and  
12 description used in connection” with the described boundaries of the reservation. (*Id.*).  
13 Plaintiff alleged that he was only exercising his treaty guaranteed vested rights to be a  
14 herdsman and to graze his livestock on the ranges. (*Id.*).

15 The complaint alleged the following. (*Id.*). In the 1990s, BLM alleged that Plaintiff was  
16 trespassing. (*Id.*). On May 24, 2002, Defendants assembled where Plaintiff’s livestock were  
17 grazing, gathered Plaintiff’s livestock, and seized the livestock without a warrant or court order  
18 for the seizure. (*Id.* at 7, 14). Defendants then transported Plaintiff’s livestock over 300 miles  
19 to the BLM facility in Palomino Valley, Nevada. (*Id.* at 14). Defendants never gave Plaintiff  
20 notice or an opportunity to dispute the underlying basis of the allegations against him. (*Id.*).  
21 Defendants gave Plaintiff a “bill” for the seizure, transport, and alleged trespass fee in excess  
22 of \$150,000 and told Plaintiff that he had to pay or they would sell his livestock on May 31,  
23 2002. (*Id.*). Defendants sold Plaintiff’s livestock on May 31, 2002. (*Id.*).

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25 <sup>4</sup> Pitts is the Sheriff of Elko County. (Mot. to Dismiss (#6) at 1).

26 <sup>5</sup> Connelley is a former Nevada State Brand Inspector. (Mot. for Summ. J. (#17) at 1).

27 <sup>6</sup> Journigan is a former Nevada Deputy State Brand Inspector. (Mot. for Summ. J.  
28 (#17) at 1).

1 The complaint alleged five causes of action. (*Id.* at 8-10, 14-15). In the first cause of  
2 action, Plaintiff alleged an unwarranted seizure of property in violation of the Fourth  
3 Amendment against Robert Abbey, Helen Hankins, Cook Utah of Duchesne, Jim Pitts, Jim  
4 Connelley, and Dennis Journigan. (*Id.* at 8). Specifically, Plaintiff alleged that Defendants had  
5 violated his rights when they “acted together in concert on May 24, 2002” and seized 132 of  
6 Plaintiff’s cattle that were grazing on historic grazing lands. (*Id.*).

7 In the second cause of action, Plaintiff alleged a due process violation under the Fifth  
8 and Fourteenth Amendments against Robert Abbey, Helen Hankins, Cook Utah of Duchesne,  
9 Jim Pitts, Jim Connelley, and Dennis Journigan. (*Id.* at 9). Specifically, Plaintiff alleged that  
10 Defendants violated his due process rights by depriving him of the ability to dispute the  
11 underlying basis of the charges alleged against him when they presented him “with a bill for  
12 the costs of gathering, transporting, and alleged trespass fees” and told him to pay the amount  
13 by May 30, 2002, or his cattle would be sold and the proceeds retained by BLM. (*Id.*). Plaintiff  
14 alleged that Defendants violated his rights and the Nevada Revised Statutes when they  
15 transported his livestock without his permission to a location 300 miles away. (*Id.*). Plaintiff  
16 alleged that Defendants violated his rights by selling his cattle on May 31, 2002, without his  
17 permission or his signature on the Brand Inspection Clearance Certificate in violation of NRS  
18 § 565.120. (*Id.*). Plaintiff alleged that Defendants violated his due process rights because  
19 they failed to provide him with a pre-deprivation hearing and terminated his ownership rights  
20 without having jurisdiction over Plaintiff or his property. (*Id.*).

21 In the third cause of action, Plaintiff alleged that Robert Abbey, Helen Hankins, Cook  
22 Utah of Duchesne, Jim Pitts, Jim Connelley, and Dennis Journigan violated Article VI of the  
23 U.S. Constitution which provides that treaties made under the authority of the United States  
24 are the supreme law of land. (*Id.* at 10). Specifically, Plaintiff alleged that the 1863 Treaty of  
25 Ruby Valley, signed by the Western Shoshone Indians and the United States, provided that  
26 the President would establish a reservation for the Shoshone to become herdsman and  
27 agriculturalists. (*Id.*). Pursuant to the Indian Reorganization Act of 1934, the South Fork  
28 Western Shoshone Indian Reservation was created in 1941 and provided that “all range,

1 ranges, and range watering rights [were] included as part of the South Fork Reservation.”  
2 (*Id.*). Defendants violated Plaintiff’s treaty rights when they seized his livestock on May 24,  
3 2002 without a warrant and without having jurisdiction over the ranges on which Plaintiff’s  
4 livestock were grazing. (*Id.*).

5 In the fourth cause of action, Plaintiff alleged that Robert Abbey, Helen Hankins, and  
6 Cook Utah of Duchense had violated his civil rights by breaching the trust of the Indian  
7 Reorganization Act of 1934. (*Id.* at 14). Specifically, Plaintiff alleged that Defendants had  
8 failed to perform their trustee responsibilities “as agents of the Trustee of the Plaintiff.” (*Id.*).  
9 Plaintiff alleged that Defendants had interfered with his free enjoyment of the historic ranges  
10 in his capacity as a Western Shoshone Indian. (*Id.*).

11 In the fifth cause of action, Plaintiff alleged that Robert Abbey, Helen Hankins, Cook  
12 Utah of Duchesne, Treasury-FMS, Allied Interstate, Inc., Pioneer Credit Recovery, Inc., and  
13 The CBE Group, Inc. violated his Fifth and Fourteenth Amendment due process rights by  
14 seizing his livestock without a warrant or court order, selling his livestock below market prices,  
15 and then attempting to collect a deficiency based on the alleged debt. (*Id.* at 15). Under the  
16 direction of BLM, Treasury-FMS attempted to collect over \$180,000 from Plaintiff for costs  
17 allegedly owed by Plaintiff. (*Id.*). Plaintiff was never given an opportunity to defend against  
18 the underlying basis of the charges against him or the opportunity to challenge the validity of  
19 the alleged debt. (*Id.*). Plaintiff informed the Department of Treasury that the debt was not  
20 legitimate. (*Id.*). The Department of Treasury then assigned the debt to Allied Interstate who  
21 attempted to collect the debt. (*Id.*). After Plaintiff told Allied Interstate that the debt was not  
22 legitimate, Pioneer Credit Recovery attempted to collect the debt. (*Id.*). After informing  
23 Pioneer Credit Recovery that the debt was not legitimate, The CBE Group attempted to collect  
24 the debt. (*Id.*). After Plaintiff told The CBE Group that the debt was not legitimate, the  
25 Department of Treasury attempted to collect the debt again. (*Id.*). The Department of  
26 Treasury told Plaintiff that it would deduct a portion of his social security payment in order to  
27 pay the debt. (*Id.*). On April 1, 2008, the Department of Treasury began deducting 15% of his  
28 social security payment without providing him an opportunity for a hearing to challenge the

1 underlying basis of the alleged debt. (*Id.*). Plaintiff continues to suffer monthly damages.  
2 (*Id.*).

3 In June 2012, this Court issued an order denying all of the pending motions to dismiss  
4 and motions for summary judgment. (Order (#37) at 11). With respect to Robert Abbey,  
5 Helen Hankins, and Treasury-FMS (collectively “Federal Defendants”), this Court found that  
6 the statute of limitations were tolled with respect to all five causes of action. (*Id.* at 9). The  
7 Court also stated, “with respect to Treasury-FMS, the only remedy available to Plaintiff against  
8 Treasury-FMS is a personal injunction requiring BLM to withdraw their debt certification to  
9 Treasury-FMS and Treasury-FMS’s obligation to honor it forthwith. This remedy is based on  
10 BLM’s violation of Plaintiff’s due process rights in determining a deficiency debt owed and its  
11 certification of that debt to Treasury-FMS.” (*Id.*).

12 In August 2012, this Court issued an order granting in part and denying in part Plaintiff’s  
13 motion for personal injunctive relief. (Order (#68) at 5). The Court granted a personal  
14 injunction requiring BLM to withdraw their debt certification to Treasury-FMS but denied  
15 Plaintiff’s request to have Treasury-FMS immediately return the funds previously deducted  
16 from his monthly Social Security payments with compound interest. (*Id.*). The Court also  
17 denied Federal Defendants’ Motion for Reconsideration of Order Denying Federal Defendants’  
18 Motion to Dismiss Complaint. (*Id.* at 6).

19 Defendants Journigan and Connelley filed a notice of appeal on July 10, 2012. (Notice  
20 of Appeal (#53)). Federal Defendants filed a notice of appeal on September 25, 2012. (Notice  
21 of Appeal (#82)).

22 On appeal, the U.S. Court of Appeals for the Ninth Circuit held that this Court abused  
23 its discretion in requiring BLM to withdraw its certification of Yowell’s debt to Treasury-FMS.  
24 (Ninth Cir. Mem. Dispo. (#101) at 3). The Ninth Circuit held that this Court’s “conclusions that  
25 Yowell had no pre-deprivation hearing before BLM impounded and sold his cattle, and that  
26 Yowell was not aware of the impoundment” could not form the basis for the injunction. (*Id.* at  
27 4). The Ninth Circuit found that BLM was not required to provide a pre-deprivation hearing and  
28 that “Yowell was plainly aware of the impoundment before it happened, as evidenced by

1 BLM's notices to Yowell and Yowell's own efforts to contest BLM's actions." (*Id.*).

2 The Ninth Circuit found that no *Bivens* action may lie against federal agencies like  
3 Treasury-FMS pursuant to U.S. Supreme Court law. (*Id.*). Additionally, the Ninth Circuit found  
4 that no *Bivens* action may lie against federal officials for strictly enforcing rules against  
5 trespass or conditions on grazing permits pursuant to U.S. Supreme Court law. (*Id.* at 4-5).  
6 The Ninth Circuit also found that Federal Defendants were entitled to qualified immunity  
7 because Yowell did not tie any allegedly unlawful behavior to the Federal Defendants and  
8 failed to show that Federal Defendants had caused him to be deprived of a clearly established  
9 federal right. (*Id.* at 5).

10 The Ninth Circuit found that this Court erred in denying State Defendants' motion for  
11 summary judgment. (*Id.* at 6). The Ninth Circuit found that State Defendants were eligible for  
12 qualified immunity because their actions were discretionary, not ministerial, under applicable  
13 state law. (*Id.*). The Ninth Circuit also found that qualified immunity applied because Yowell  
14 failed to establish that State Defendants either failed to follow the applicable state law, which  
15 thereby caused him to be deprived of a clearly established federal right, or that the state law  
16 was itself patently violative of fundamental constitutional principles. (*Id.*).

17 The Ninth Circuit reversed this Court's orders denying Federal Defendants' motions to  
18 dismiss and for reconsideration and State Defendants' motion for summary judgment. (*Id.*).  
19 The Ninth Circuit vacated this Court's injunction and remanded the case. (*Id.* at 7).

## 20 DISCUSSION

21 Pursuant to the remand, this Court now grants Federal Defendants' motions to dismiss  
22 and for reconsideration and grants the State Defendants' motion for summary judgment.

## 23 CONCLUSION

24 For the foregoing reasons, IT IS ORDERED that this Court's orders denying Robert  
25 Abbey, Helen Hankins, and Treasury-FMS's Motion to Dismiss (#4) and Motion for  
26 Reconsideration (#59) are REVERSED. The Court now GRANTS the Motion to Dismiss (#4)  
27 and Motion for Reconsideration (#59).

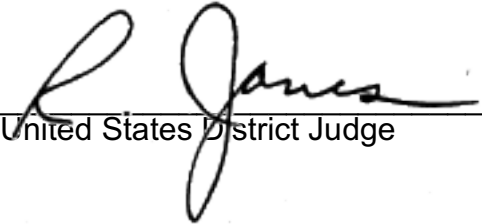
28 IT IS FURTHER ORDERED that this Court's order denying Jim Connelley and Dennis

1 Journigan's Motion for Summary Judgment (#17) is REVERSED. The Court now GRANTS  
2 the Motion for Summary Judgment (#17).

3 IT IS FURTHER ORDERED that this Court's order granting Yowell an injunction  
4 requiring the BLM to withdraw its debt certification to Treasury-FMS is VACATED. The Court  
5 now denies Plaintiff's Motion for Personal Injunctive Relief (#43).

6 IT IS FURTHER ORDERED that Robert Abbey, Helen Hankins, Treasury-FMS, Jim  
7 Connelley, and Dennis Journigan are no longer parties to this case in light of the above. The  
8 Clerk of the Court shall enter judgment accordingly.

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10 Dated this 16th day of September, 2013.

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13 United States District Judge  
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